BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

IN RE: BRADLEY COUNTY BOARD OF EDUCATION, Petitioner, vs. [redacted], Respondent.	)	No. 00-13

FINAL ORDER

Howard W. Wilson
Administrative Law Judge
6 Public Square, North
Murfreesboro, Tennessee 37130

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[To protect the confidentiality of the minor student [redacted] will be referred to as "R" on all remaining pages of this decision]

FINAL ORDER
CASE NO.: 00-13

A Due Process Hearing was requested by counsel on behalf of the Bradley County Board of Education. On February 15, 2000, the Division of Special Education, Tennessee Department of Education appointed this Administrative Law Judge to hear the case. A Pre Conference Order was issued on February 23, 2000. The 45 day rule was requested to be waived and the Court granted the request for good cause. The case was heard in Cleveland, Tennessee on May 23-24, 2000 and in Murfreesboro, Tennessee on July 6, 2000.

I. Findings of Fact

R is a fifteen year old male who is a student at Charleston School in Bradley County, Tennessee. The school system evaluated R and issued a psychoeducational evaluation on March 17, 1997. He has been certified by the school system as eligible for special education and related services by virtue of learning disability and health impairment. The deficit negatively impacted his reading comprehension. In 1999, the Board of Education completed another evaluation which identified R with learning disability in written expression.

In March, 1999, R's parent requested an IEP Team meeting to review and revise R's IEP. (Tr. 42) The meeting was held on May 3, 1999 where the IEP team wrote a new IEP for R. (Exhibit 2). A new psychoeducational evaluation was completed by the Board of Education and issued on January 21, 2000. It found R's intelligence to be in the average range. The Board of Education's report identified R's learning disability in written expression and his health impairment because of a significant processing deficit in

visual motor intergration. (Exhibit 9). An IEP Team met on January 24, 2000 to develop an IEP based on the information from the evaluation issued on January 21st. (Exhibits 5, 6)

Ms. Katherine Ingram, one of Bradley County's School psychologists, with a master's degree, who completed the evaluation for the school district, testified that the teachers she interviewed had not observed any seizures. (Tr. 245). Ms. Ingram said she spent 30-45 minutes with R interviewing him and about the same time administering the VMI evaluation (Tr. 245). She observed him in four classes about 30 minutes each. (Tr. 243). Besides licensure in school psychology, Ms. Ingram is endorsed as special education teacher and general education teacher.

Ms. Ingram's report was based on six separate and distinct evaluative instruments as well as extensive classroom observations, teacher/parent/student interviews, and record reviews . (Exhibit 8). The student's parent gave permission for this evaluation and participated fully in creating the assessment plan after receiving her rights. (Exhibit 3; Tr., 5/23-24/00, 48-8- 49-16, tr., 5/23/24/00, 54-7 to 80)

The parent was given the Ingram report on the 21st of January and had the weekend to review it before the continuation of the meeting on Monday, January 24, 2000. (Tr., 5/23-24/00, 70-22 to 71-12). On the 24th an IEP was developed for the student, based on the Ingram report and the integrated assessment report finding the student eligible. The parent participated in the meeting, had full input, voiced her concerns, and signed it "in agreement" after checking all the appropriate boxes "yes". (Tr., 5/23-25/00, 58-21 to 61-4; Exhibit 6).

The respondent's mother testified that she had been given the rights booklet that says she has a right to an independent evaluation. (Tr. 190). Further, at the time in question regarding the IEP meetings of January, 2000, the parent was represented by and was consulting with Suzanne Michelle, a staff attorney with Tennessee Protection and Advocacy, Inc. (Tr., 5/23-24/00, 49-23 to 51-14)

On February 8, 2000, Ms. Michelle, attorney for student, wrote a letter to Mr. Kitch, attorney for school district, requesting an independent educational evaluation. On February 10, 2000 Vicki Beaty, Director of Special Education for the Board of Education sent a letter to R's mother attaching a list of independent evaluators. The listing included evaluators which met the school system's minimum qualifications for persons who conduct psychological evaluations who are located within the school district's geographical area (75 mile radius). (Exhibit 11) On February 15, 2000, Bradley County Schools filed a request for an impartial due process hearing under the authority of 34 CFR 300.502(b)(4), based on its belief that the Ingram evaluation was appropriate.

Judith Kaas Weiss, Ph. D. conducted an evaluation of R on March 23 and 24, 2000 in Nashville. Dr. Weiss is a neuropsychologist and has practiced in the field for several years. Dr. Weiss found that R met the criteria for eligibility for special education as other heath impaired and with specific learning disabilities in math and written language as a function of his processing disorder (visual perceptual disorder). (p. 8 of Exhibit 15) The only history Dr. Weiss took was from the parent, and at the time of her report the only school records she possessed were past psychological reports. She never saw the student in a educational environment, never visited the student's school, and chose not to

talk to any teachers or administrators. (Tr., 7/6/00, 92-14 to 93-9; Tr., 7/6/00, 95-3 to 19)

Dr. Weiss testified that she is a licensed clinical psychologist, (6/7/00, 9-16), and that she is not a licensed school psychologist nor does she have any degree or license in either general or special education. (Tr., 7/6/00, 21-8 to 9; Tr. 7/6/00, 25-8 to 27-27). Dr. Weiss has been a board member for Tennessee Protection and Advocacy. (Tr., 7/6/00, 89-3 to 11). She also lists herself as a consultant for Tennessee Protection and Advocacy from 1980 to present.

Dr. Pamela E. Guess, who was designated by the Court as an expert in school psychology, health related/clinical psychology and assessment (Tr., 5/23-24/00,388-22 to 391-17), testified that the Weiss report was not appropriate. (Tr., 5/23-24/00, 403-1 to 5; Tr., 5/23-24/00, 421-13 to 22). Dr. Guess further stated that the lack of observational data rendered the Weiss report inappropriate. (Tr., 5/23-24/00, 395-10 to 396-7). The reason that observational data in the classroom is so important is that a child could meet criteria for having a disability but only would be eligible for services if the disability caused an adverse effect on educational performance. (Tr., 5/23-24/00, 398-13 to 400-6). Drawing of a conclusion of eligibility without observations would not be valid. (Tr., 5/23-24/00, 403-1 to 14). Dr. Guess testimony is consistent with state regulatory requirements.

The proof was extremely clear that Dr. Weiss did not follow required procedures in evaluating the student. She admitted that she conducted no classroom observations of her own. (Tr., 7/6/00. 136-4 to 14; Tr., 7/6/00, 96-5 to 9). She stated that all the information she had when forming her opinion was previous evaluations and parental history, (Tr., 7/6/00, 92-14 to 93-9), and nowhere in her report is referenced any

observations she did herself in the educational setting. (Ex. 15). Further, while calling for a neurological evaluation and while finding Tourette syndrome in her report she never called Dr. Paul Knowles, R's Medical Doctor, concerning his treatment of the student, to see whether any such evaluation had been completed, or for that matter any other purpose. (Tr., 7/6/00, 114-19 to 20).

II. Issues

1. Whether the student lacks standing to request an independent neuropsychological evaluation at school system expense.

2. Whether the psychological evaluation conducted by the school system was appropriate.

3. Whether the neuropsychological evaluation for which the student wishes to be reimbursed was inappropriate.

III. Conclusions of Law

Procedural flaws do not automatically require a finding that a school system has denied a child a free appropriate public education. However, procedural flaws that result in the loss of educational opportunity or seriously infringe the parents' opportunity to participate in the IEP formulation process, clearly result in the denial of a free appropriate public education. W.G. v. Board of Trustees of Target Range School District, 960 F. 2d 1479, 1483 (9th Cir. 1992). Further, the Sixth Circuit has held that technical defects do not result in a violation of the IDEA if there is no substantive harm. Thomas v. Cincinnati Board of Education, 918 F. 2d 618, 625 (6th Cir. 1990). Any perceived difficulty with procedural issues which do not rise to a level of actual violations for which a remedy may

exist because the school system has substantially complied with the Individuals with Disabilities Education Act (IDEA) fail. Cordrey v. Euckert, [917 F.2d 1460, 17 EHLR 104 (6th Cir. 1990), cert. den. 111 S. Ct. 1391 (1991)]. It would be inappropriate to "exalt form over substance" by holding that alleged technical deviations rendered the school system liable. Doe v. Defendant I, [898 F 2d 1186, 1190-91 (6th Cir. 1990)] Finally, only harmful violations described in Doe v. Alabama State Department of Education, [915 F. 2d 651 (11th Cir. 1990)] would entitle a child to relief.

One of the most important procedural rights secured by the IDEA is the right to a proper evaluation. Under 34 CFR 300.532, tests and evaluation materials must include those tailored to assess specific area of educational need and not those that are designed to provide a single general intelligence quotient. [34 CFR 300.532(b)]. Further, the child must be assessed in all areas relating to the suspected disability, including, if appropriate, academic performance. [34 CFR 300.532(g)]. Under 300.333, the school system must draw upon a variety of sources, including aptitude, and achievement tests, in making placement decisions. [34 CFR 300.533(a)(1)]. Further, the school system is obligated to obtain this information and ensure that it is documented and carefully considered. [34 CFR 300.533(a)(2)].

For a parent to obtain an independent educational evaluation at school district expense, the parent must disagree with an evaluation obtained by the public agency. 34 300,502(b) (1).

The IDEA sets forth in detail the requirements for an evaluation to be appropriate, stating that the school system must:

(A) Use a variety of assessment tools and strategies to gather relevant functional and developmental information, including information provided by the parent, that may assist in determining whether the child is a child with a disability and the content of the child's individual education, plan, including information related to enabling the child to be involved in and progress in the general curriculum . . .
(B) not use any single procedure as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and
(C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

20 USC 1414(b)(2). The Act further requires that the school system ensure that:

(A) tests and other evaluation materials used to test a child . . .
  (i) are selected and administered so as not be discriminatory on a racial or cultural basis, and
  (ii) are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so; and
(B) any standardized tests that are given the child --
  (i) have been validated forth specific purpose for which they are used;
  (ii) are administered by trained and knowledgeable personnel; and
  (iii) are administered in accordance with any instructions provided by the producers of such tests;
(C) the child is assessed in all areas of suspected disability; and
(D) assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

20 USC 1414(b)(3).

Thus , the test for appropriateness is whether the school system's own evaluation was in compliance with the IDEA. See Houston Indep. School Dist., 30 IDELR 564 (ALJ Texas 1999); San Antonio Indep. Sch. Dist., 29 IDELR 630 (ALJ Texas 998); and Fallbrook Union elementary Sch. Dist., 28 IDELR 678 (ALJ California 1998).

Classroom observations are required under Tennessee state regulations implementing the state special education statute:

The individual assessment **shall include an observation** by an M-Team (now IEP) member (other than the child's teacher) **of the child's academic performance**

and, where appropriate, an observation of the child's behavioral performance in the regular classroom setting or, if the child has not be previously enrolled in school, an observation in an environment appropriate for a child of that age. (emphasis added)

CRR of Tennessee Chapter 0520-1-3-.09(4)(a)(5)(ii), p33. Further,

> **Classroom observations must be included in each individual assessment**, unless clearly not feasible, as may be the case with homebound students. **Although the observation is required to be done in the regular classroom setting**, for a child with an articulation disorder, a speech teacher, or therapist may do an observation of the child's articulation behavior in conversational speech. (emphasis added)

State Implementation Policies and Procedures, CRR of Tennessee, Chapter 0520-1-3-.09(4)(a)(5)(ii), p.33

IV. Conclusions Applying the Law

Parents are to be given written notice whenever a school system either proposes to change or refuses to change the child's evaluation, educational placement or the provision of a free appropriate public education to the child. This the school did, while in an unusual way, when the school district provided the parents with a copy of the minutes of the IEP team meeting in which the parents participated. The parent had written results of the IEP team meeting as well as the parent participated fully in the discussions and deliberations at the meeting. (Exhibit 4, 5).

Any claimed procedural flaws or violations were inconsequential at worst, and were therefore of the "non-harmful" variety; therefore, the student is entitled to no relief from the School system in this case due to minor procedural difficulties. Mere technical violations of IDEA procedures, which do not deny meaningful parental participation, do not render a school systems actions inappropriate. Doyle v. Arlington County Sch. Bd., 19 IDELR 259 (E.D. Va. 1992)

The parents failed the first part of the test to determine if the parent is entitled to an independent educational evaluation by not giving some notification that she disagreed with the Ingram report. But the parent instead of disagreeing, actually agreed with her preferences indicated on the IEP form and also the Integrated Assessment Report. Further if she truly wanted to disagree, she had previously been advised by Counsel, and thus would have known what to say or do to indicate her wishes. (Tr., 5/23-24/00, 49-14 to 50-1; Tr., 5/23-24/00, 52-21 to 53-9). Finally the parent testified that she knew full well that she could have another IEP team meeting to discuss her son's program. (Tr. 5/23-24/00, 148-11 to 17)

The proof demonstrated that the statutory and regulatory criteria were met by the Ingram report. (Tr., 5/23-24/00, 226-18 to 240-19; Tr., 5/23-24/00, 352-15 to 363-23). No one testified that they were not. A review of the Ingram report (Exhibit 9) demonstrates the thoroughness in which the assessment plan was conducted. The six separate and distinct evaluative instruments that were administered were done so in appropriate conditions and by qualified personnel. The content of the document establishes the reaching of appropriate conclusions based upon the evaluator's expertise and experience. The conclusions are correct, based upon the data gathered, and the report did what it was designed to do -- determine whether the student met criteria for special education and related services. (Ex 9)

Dr. Weiss has not followed the state regulations requiring a direct observation in her evaluation. This fatally invalidates her evaluation. The Court is concerned that Dr. Weiss would not have followed the regulations since she had been so involved with them in previous employment (i.e. psychologist of Franklin Special School District). From the

live testimony of Dr. Weiss and a thorough analysis of R's evaluation completed by Dr. Weiss, the Court affords her testimony little weight. Dr. Weiss disregard for the basic regulations of the Tennessee Department of Education also concerns the Court.

Notwithstanding the alleged additional findings of the Weiss' evaluation, reimbursement cannot be awarded to an evaluator who has violated state regulations. No amount of minor procedural violations on the part of the school district would out weigh the violated state regulations of the independent evaluator, Dr. Kathy Weiss.

Judicial Note: While this impartial due process hearing was held to only consider the very narrow issue of whether the board of education must pay for the independent evaluation performed by Dr. Weiss, the Court would be remiss if it did not comment on R's IEP. While R's grades are mostly D's and F's and can be partially attributed to his lack of effort or other circumstances, an examination of the IEP itself does reveal that a better IEP could have been written. This Court would urge both parties to work together to write an IEP that would assist R to be successful in school.

V. Order

Dr. Weiss' independent evaluation does not meet state minimum standards, and therefore the parents are not entitled to reimbursement by the Bradley Board of Education.

IT IS THEREFORE ORDERED, that the school district's evaluation (Ingram Report) is appropriate and meets the legal mandates of the Act.

IT IS FURTHERED ORDERED that the independent evaluation of Dr. Weiss does not meet state educational standards and is therefore inappropriate.

IT IS FURTHERED ORDERED that the request for reimbursement of the Weiss evaluation is denied.

IT IS FURTHERED ORDERED that the school system is the prevailing party for all purposes.

THIS DECISION IS BINDING UPON ALL PARTIES UNLESS APPEALED. Any party aggrieved by the findings and decision may appeal to the Davidson County Chancery Court of the State of Tennessee, or may seek review in the United States District Court for Tennessee. Such an appeal must be taken within sixty (60) days of the entry of the Final Order in non-reimbursement cases and within three (3) years in cases involving reimbursement of educational costs and expenses. In appropriate cases, the reviewing Court may direct this Final Order be stayed.

ENTERED, this the 11th day of October, 2000.

Howard W. Wilson 014007
Administrative Law Judge
6 Pubic Square, North
Murfreesboro, Tennessee 37130

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of this Final Order was mailed on the 11th day of October, 2000, to counsel for the school system, John Kitch, Esq., Suite 305, Hillsboro Pike, Nashville, TN 37212; counsel for the parents, Ms. Suzanne Michelle, Esq., Tennessee Protection & Advocacy, 2416 21st Ave. South, Nashville, TN 37212; and to the Division of Special Education, State Department of Education, Nashville, TN 37243-0375.

Howard W. Wilson